



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 1, 1998

Ms. Brenda L. Clayton
Kelly, Hart & Hallman, P.C.
301 Congress, Suite 2000
Austin, Texas 78701

OR98-1113

Dear Ms. Clayton:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114375.

The Fort Worth Dallas Ballet (the "ballet"), which your office represents, received a request for "copies of minutes of the two specially called executive committee meetings on June 12, 1997, and July 24, 1997, as well as the results of two internal investigations of sexual harassment charges." The ballet also received a second request for all information relating to complaints of discrimination and/or sexual harassment filed against the ballet or its employees during the summer of 1997. You assert that the ballet is not a governmental body for purposes of section 552.003 of the Government Code. Alternatively, you argue that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted information.

In Open Records Letter No. 97-2733 (1997), this office ruled that the ballet was a governmental body for the purposes of the Open Records Act because it was supported in part by public funds. You have provided us with additional arguments and documents in an effort to demonstrate that the ballet provides a measurable amount of service in exchange for these public funds. However, after a careful review of the submitted grant applications and contract language, we conclude that the ballet solicited and received assistance for its general support from sources that receive some portion of their funding from public sources. *See* Open Records Decision No. 228 (1979). Consequently, we decline to overrule our decision in Open Records Letter No. 97-2733 (1997).

You also claim that certain rules of civil evidence and civil procedure make the requested information confidential. We note, however, that chapter 552 of the Government

Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). The provisions of civil evidence and civil procedure which you cite regulate discovery in court proceedings and not the availability of information under chapter 552 of the Government Code. We will now consider the applicability of your claimed exceptions to the submitted information.

You argue that most of the requested information may be withheld under section 552.103 of the Government Code. To show that section 552.103 is applicable, the ballet must demonstrate that 1) litigation is pending or reasonably anticipated and 2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the ballet must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. After reviewing your arguments, we conclude that you have not shown that litigation is reasonably anticipated; therefore, you may not withhold the information under section 552.103.

You also argue that much of the submitted information is protected by common-law privacy. Section 552.101 incorporates the common-law right of privacy which excepts from

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Although information relating to the investigation of sexual harassment or sexual assault involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. Open Records Decision No. 444 (1986). However, identifying information about the witnesses to or the victims of the alleged sexual harassment is protected by the doctrine of common-law privacy and must be withheld. *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). We have marked the information that must be withheld.

Next, you argue that some of the submitted information is excepted from disclosure by section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from an attorney to a client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from an attorney to a client, or between attorneys representing the client, are not protected. *Id.* Moreover, section 552.107(1) does not protect from disclosure factual information compiled by a governmental attorney acting in the capacity of an investigator rather than a legal advisor. Open Records Decision No. 462 (1987). We find that some of the submitted information may be withheld under section 552.107 because it contains an attorney's legal advice or opinion. We have marked the information that may be withheld under section 552.107.

You contend that some of the documents at issue are excepted from disclosure because they constitute attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 (1996) at 4. The second prong of the work product test requires the governmental body

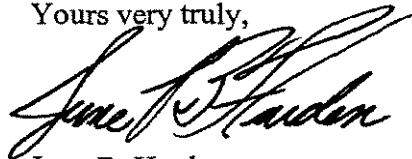
to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

You state that the "documents reveal the investigation conducted at the direction of legal counsel and implicitly reveal the attorney's directions to Ms. Jacobs, thereby revealing the attorney's strategy and thought processes." However, it appears that the documents contain only summaries and other information that refers to the facts of the case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 (1996) at 4 (citing *Owens-Corning*, 818 S.W.2d at 750 n.2). We note that the investigator's notes do not show how the attorney will use the facts, if at all, nor do the notes suggest trial strategy or indicate the lawyer's reaction to the facts. Therefore, we conclude that you may not withhold the requested documents from disclosure as attorney work product.

Lastly, the documents also contain the home phone numbers of current or former employees of the ballet. It is possible that this information may be confidential under section 552.117 of the Government Code, and therefore, depending on the specific circumstances, may not be released. Section 552.117 excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information revealing whether a public employee has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information if a current or former employee or official requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold this information of a current or former employee who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ glg

Ref.: ID# 114375

Enclosures: Marked documents

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